Filed 1/28/11 In re Viton CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re WILLIAM LLOYD VITON on Habeas Corpus.	B225168 (Los Angeles County Super. Ct. No. VA017007)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Daniel S. Murphy, Judge. Petition granted.

Rich Pfeiffer, under appointment by the Court of Appeal, for Petitioner

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Julie A. Malone and Ryan K. Schneider, Deputy Attorneys General, for Respondent.

On October 27, 2009, William Viton appeared before the Board of Parole Hearings (the Board) for a parole consideration hearing—his fourth since his conviction of second degree murder, with the use of a firearm (Pen. Code, §§ 187, subd. (a); 12022.5, subd. (a)), and his June 1993 sentence to prison for 15 years to life, plus a three-year consecutive term for the firearm enhancement. The Board concluded that Viton was "suitable for parole and would not pose an unreasonable risk of danger to society or threat to public safety if released from prison." It granted Viton's request for parole, subject to review by the Governor's office. (Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2.)

On March 19, 2010, Governor Schwarzenegger reversed the Board's decision to grant parole, concluding that Viton's release "would pose an unreasonable risk of danger to society at this time." Viton petitioned for habeas corpus to the Superior Court, which denied the petition, concluding that "some evidence supports the Governor's finding that Viton is unsuitable for parole."

Viton filed an original petition for habeas corpus in this court on June 21, 2010. After reviewing the petition, the State of California's informal opposition, and Viton's reply, we appointed counsel to represent Viton in this court, and on October 27, 2010 we ordered the Secretary of the Department of Corrections and Rehabilitation to show cause why the relief prayed for in the petition for writ of habeas corpus should not be granted.

Based on the petition, the return filed by the State, and Viton's traverse, we grant the petition for habeas corpus and reinstate the Board's decision to grant parole to Viton.

Factual and Procedural Background

1. The commitment offense.

The Governor's Indeterminate Sentence Parole Release Review accurately summarizes the underlying facts regarding Viton's July 1992 commitment offense: "Guevara and his family went to the park next to Viton's home. At one point, Viton complained to the Guevara family about their loud radio. They initially turned the volume down, but later turned it back up. . . . According to Guevara's family members,

Viton approached the chain-link fence around his backyard and repeatedly swung a hammer in an attempt to hit some of the men leaning against the fence. He also uttered racial profanities at the family. Some members of the Guevara family responded with profane remarks and attempted to take the hammer from Viton. Viton retrieved a shotgun from inside his home and went back outside; the Guevaras threw empty bottles at him. According to the probation report, Viton shot into the air. Then, he pointed the gun and shot at Guevara, striking him in the chest. Guevara died from multiple shotgun pellet wounds to the right chest, side, shoulder, and upper arm."

At the time of his arrest, Viton was 38 years old, with no gang affiliation, no history of substance abuse, and no juvenile or adult criminal record. When the Governor denied parole, he was 55 years old. He has been married for 35 years, and has three children.

2. Viton's record during incarceration and plans upon release.

Viton had a high school diploma when he entered prison, and his adult basic education tests at the maximum score (12.9 TABE). In prison he completed a vocational upholstery program, he was employed in the furniture factory as a maintenance machinist, and he served as a teacher's aide in the vocational upholstery shop, all with work reports ranging from average to exceptional.

Viton had no serious disciplinary reports during the 13 years before the Board's 2009 hearing.[1] During his incarceration Viton participated actively in available self-help programs, including workshops and independent study programs designed to help inmates gain remorse and understanding of the impact of their crimes. He participated in AA and substance abuse programs, although he had no prior substance abuse record.

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[1] Viton received no "115" reports, and four "128A" reports—the most recent about five years before the hearing—none of them serious. The four 128A reports were issued on November 25, 1995, for disobeying orders; on August 9, 1998, for disrespecting a supervisor; on May 3, 2002, for failure to report to a work assignment; and on October 21, 2004, for unprovoked hostility.

Before his incarceration Viton had a stable family life, he operated his own truck-repair business, and according to the Governor's review, Viton maintained "seemingly solid relationships and close ties with supportive family and friends throughout his incarceration." He was actively involved with the Jehovah's Witnesses throughout his incarceration. Following his release on parole, Viton plans to reside with his wife in Los Angeles County, and he has a verified offer of employment as a truck mechanic.

In the July, 2008 Board Report, the examining doctor reviewed Viton's background, his personal, social, and criminal history, his institutional programming and community and social support during incarceration, his release plans, and his clinical presentation. Based on those factors, he concluding that Viton "'poses a very low to low likelihood to become involved in a violent offence if released into the free community'."

3. The Board's decision.

In reaching its October 27, 2010 decision that Viton is suitable for parole, the Board expressly weighed the considerations set forth in the regulations, which require it (and the Governor) to consider "[a]ll relevant, reliable information" tending to show either suitability or unsuitability for parole, such as the nature of the commitment offense, the prisoner's social history, mental state, criminal record, and attitude toward the crime, and the prisoner's parole plans. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) Of these factors, it found most troubling the fact that Viton had carried out his commitment offense "in an especially atrocious and cruel manner," exhibiting inexplicably disproportionate anger and callousness, and affecting multiple victims.

However it also found—consistent with the psychological evaluation—that his positive adjustment, as well as other considerations, "show that you no longer pose a risk of danger to society . . . ." The other considerations included the fact that Viton had a stable social history, good family relationships, strong religious involvement, and solid educational performance; he had no prior criminality, no gang activity, no drug or alcohol use, and no record of violence apart from the commitment offense. He had no serious misconduct during his incarceration; he had exhibited what appeared to be genuine remorse; and he was reported to have "'a very low to low likelihood to become involved

in a violent offence if released into the free community'." And—again consistent with the most recent psychological evaluation—it found that Viton had addressed concerns that had been expressed in earlier reports, that he lacked genuine remorse and insight into his behavior.

Those considerations, along with his marketable skills, his verified offer of employment, and his many offers of financial assistance from family and friends, led the Board to its conclusion that Viton is suitable for parole.

4. The Governor's reversal of the Board's decision.

In reversing the Board's order granting parole to Viton, the Governor affirmed the existence of almost all of the positive factors on which the Board relied in reaching its decision, expressly recognizing Viton's lack of criminal history and his lack of history of serious discipline for rules violations during his incarceration. It recounted the extensive list of positive factors indicating Viton's suitability for parole: his level of education before entering prison; his extensive vocational training during his incarceration; his demonstrated responsibility and leadership in various institutional positions; his active participation in a dozen or more self-help and therapy programs; his commitment as a Jehovah's Witness and thrice-weekly participation in meetings and bible study groups; his positive evaluations from mental-health and correctional professionals; his solid relationships with family and friends; and his plans for living and commitments for employment upon his release.

The Governor's review also identified the negative factors on which he relied to find that "Viton still poses a risk of recidivism and violence and that his release from prison at this time would pose a current, unreasonable risk of danger to public safety." The Governor expressly based his decision on the gravity of Viton's commitment offense; on doubts about Viton's acceptance of responsibility and remorse for it; and on doubts about whether Viton continues to lack insight into the commitment offense, and into the "significant role anger played" in it and in his "recent misconduct." These factors underlie the Governor's conclusion that Viton's release "would pose an unreasonable risk of danger to society at this time."

5. The Superior Court's denial of habeas corpus relief, and Viton's original petition in this court.

The superior court reviewed Viton's petition for writ of habeas corpus, concluding that "the record contains 'some evidence' to support the Governor's finding that the Petitioner presents an unreasonable risk of danger to society and is unsuitable for parole." On that basis, on May 27, 2010, it denied the petition.

On June 21, 2010, Viton filed his original petition for writ of habeas corpus in this court, challenging the Governor's reversal of the Board's 2009 decision to grant him parole.

Discussion

The Board's and the Governor's Discretion to Grant or Deny Parole.

Penal Code section 3041 creates a cognizable liberty interest in parole, within the protection of the California Constitution's due process clause. (Cal. Const., art. I, § 7, subd. (a); *In re Lawrence* (2008) 44 Cal.4th 1181, 1205.) "The granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals *as soon as possible* and alleviate the cost of maintaining them in custodial facilities. [Citations.] Release on parole is said to be the rule, rather than the exception [citation], and the Board is required to set a release date unless it determines that 'the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration . . . .' [Citation.]" (*In re Vasquez* (2009) 170 Cal.App.4th 370, 379-380.)

Thus while the California Constitution affords the Governor discretion to review the Board's decision to grant parole to an inmate convicted of murder and sentenced to an indeterminate prison term (Cal. Const., art. V, § 8, subd. (b)), under the governing law, "parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." (*In re Rosenkrantz* (2002)

29 Cal.4th 616, 654.) The Governor's discretion must be exercised upon the same criteria and standards that apply to the Board. (*Id.* at p. 660.)

The purpose of the Governor's (and the Board's) evaluation is "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 655.) The specified criteria for the evaluation encompass "[a]ll relevant, reliable information" tending to show either that Viton is or is not suitable for parole. (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

The discretion of the Board with respect to this question is """almost unlimited,""" and the Governor's discretion is the same. The Governor's decision must be based on the same evidence and materials that were before the Board, and it must be based on the same factors that the Board was required to consider in reaching its determination. (Pen. Code, § 3041.2, subd. (a); *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 655, 660-661; *In re Hare* (2010) 189 Cal.App.4th 1278, 1289-1290.) Circumstances that indicate an inmate's suitability for parole include the inmate's lack of a significant history of violent crime, his stable social history, his recognition of remorse, that he committed the crime as a result of long-term stress factors or battered woman syndrome, that he is of an age that reduces the probability of recidivism, that he has marketable skills and realistic plans for employment upon release, and that during his incarceration he has engaged in institutional activities that indicate an enhanced ability to function within the law upon his release. (Cal. Code Regs., tit. 15, § 2402, subd. (d).) Circumstances that indicate an inmate's unsuitability for parole would include that he committed the commitment offense in a particularly heinous, atrocious, or cruel manner; that he has a record of violence; that he has an unstable social history; that he has previously sexually assaulted another individual in a sadistic manner; that he has a lengthy history of severe mental problems related to the offense; and that he has engaged in serious misconduct in prison. (Cal. Code Regs., tit. 15, § 2402, subd. (c).)

Judicial Review of the Governor's Decision.

Consistent with the prisoner's due process liberty interest, the Governor's decision with respect to these issues remains subject to judicial review, in order "to ensure that the decision reflects 'an individualized consideration of the specified criteria' and is not 'arbitrary and capricious.'" (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1205.) In reviewing the decision of the Governor to deny parole, "the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision," based upon the factors specified by statute and regulation. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.) "[A]s specified *by statute*, current dangerousness is the fundamental and overriding question for the Board and the Governor." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1213.)

Therefore if "'*the decision's consideration of the specified factors* is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus . . .'." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1210; *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.) Likewise, unless the specific factors on which the decision rests support the conclusion that the prisoner would pose a current threat to public safety if released, those factors can provide no support for the decision. (*In re Lawrence*, *supra*, 44 Cal.4th at pp. 1213-1214.)

Whether the Governor's decision to reverse the Board's decision and to deny parole to Viton meets these conditions is the review we undertake here. We examine the factual grounds on which the Governor relied to deny parole to Viton in order to determine whether they are supported by some evidence in the record, and whether, if supported, they in turn support the conclusion that Viton continues to present an unreasonable risk of danger to society, rendering him unsuitable for parole.

Factual Grounds for Governor's Denial of Parole.

The Governor expressly based his decision to deny parole to Viton on the "especially heinous" nature of the commitment offense, in that it resulted from Viton's inability to control his anger, and his "actions displayed an exceptionally callous

disregard for the lives and suffering of the [victim's] family."[2] The Governor relied also on doubts about whether Viton had accepted responsibility for his conduct and had shown remorse for its consequences, and whether he continues to lack insight into the commitment offense and into the "significant role anger played" in it and his "recent misconduct."

The fact that Viton's commitment offense was egregious is undeniable (and Viton does not try to deny it). However, the fact that the offense was egregious cannot alone preclude a determination that the inmate is suitable for parole. (*In re Lawrence, supra,* 44 Cal.4th at p. 1214 [reliance on circumstances of the offense can violate inmate's due process rights even if offense was particularly egregious].) As our Supreme Court has noted, recent court decisions both affirming and setting aside parole denials have almost uniformly concluded "that the circumstances of the underlying homicide were, in fact, particularly egregious . . . ." (*Id.* at pp. 1215, 1218 ["it has become evident that there are few, if any, murders that could *not* be characterized as either particularly aggravated" or as exceeding the minimum necessary to convict].)

Viton's crime was egregious in 1992 when he committed it; it remains no less so today. Because Viton can never do anything to change the nature of his past acts and their consequences, reliance on such immutable factors may tend to thwart the rehabilitative goals of our penal system and the requirements of due process. (*In re Scott* (2005) 133 Cal.App.4th 573, 594-595 [reliance on immutable factors may result in due process violation unless circumstances of offense rationally indicate continuing unreasonable public risk if prisoner is released]; *In re Vasquez, supra,* 170 Cal.App.4th at pp. 379-380 [parole is required unless gravity of commitment offense is such that public safety requires additional incarceration].)

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[2] The Governor's decision states that "[t]he gravity of the crime supports my decision," apparently intending that as an independent ground for his decision.

In determining an inmate's suitability for parole, the Governor therefore is entitled—and required—to consider the egregiousness of the commitment offense, along with other facts that might show the inmate's unsuitability for parole. (Cal. Code Regs., tit. 15, § 2402, subd. (c).) But these facts are probative of unsuitability "only to the extent that [they are] shown by the record and [that they are] rationally indicative of the inmate's current dangerousness." (*In re Twinn* (2010) 190 Cal.App.4th 447, 465.) The relevant question is not whether the offense was particularly egregious or the prisoner's conduct was particularly unjustified, but whether these factors shed light on the inmate's current suitability for parole. "[T]he Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts . . . *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221.) And—particularly relevant here—"by necessity and by statutory mandate" this inquiry cannot be undertaken "without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*Ibid.*)

The Governor's decision reflects no consideration of the impact of the passage of time on the probative value of the commitment offense as a basis for predicting Viton's current dangerousness. It reflects no consideration of the changes over the years in Viton's attitude and insight, and the impact of those changes on the commitment offense's reliability for that purpose. And it identifies no rational nexus between the egregiousness of Viton's 1992 offense and his current suitability for parole. We conclude, therefore, that the Governor's reference to the egregiousness of the underlying offense does not support his conclusion that Viton "*continues* to pose an unreasonable risk to public safety." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221.)

Viton's Insight, Acceptance of Responsibility, and Remorse for his Conduct.

The Governor's decision identifies some of Viton's past statements and beliefs as reflecting a lack of remorse, a lack of insight into his conduct, and a lack of acceptance of responsibility for its consequences. The Governor cites the inconsistency of those earlier statements with Viton's more recent acknowledgements of responsibility and remorse as

evidence justifying doubt about Viton's insight into his offense and into "the role that anger plays in his violent actions."

The Governor points, for example, to statements Viton reportedly made to the Board in 2003, that when he shot the victim he "'did not realize'" that "'the pellets in the shotgun could kill anyone'"; that he believed his conduct was justifiable under the circumstances facing him; and expressing uncertainty, as recently as 2004, that the victim of his shooting had actually died. And he notes particularly Viton's dismissal of these earlier beliefs as no longer relevant. The Governor takes these statements (along with an incident reported in a 2003 counseling chrono and discussed at Viton's 2004 Board hearing) as examples of Viton's consistent minimization of his angry behavior, his responsibility for the murder, and his lack of remorse for it, thereby indicating the relevance of the commitment offense and his risk of danger to society.

But the Governor's decision does not undertake to consider whether Viton's insight and beliefs with respect to these factors might have changed since these statements and events in 2003 and 2004, nor does it evaluate the impact of any such changes on Viton's remorse and acceptance of responsibility for his conduct, and his understanding of its underlying causes. While characterizing Viton's past doubts about the victim's death and his own justifications for the murder as consistent, the Governor's decision does not evaluate either the credibility or the probity of Viton's more recent statements on which the Board relied to find that Viton's attitude, outlook, and insight had changed during his years of incarceration. It cites no reason, beyond the mere existence of the earlier statements, to conclude that they show that Viton is unsuitable for parole.

Viton's past statements and beliefs are facts that cannot be changed. They will forever reflect the state of Viton's insight into his commitment offense, and the state of his remorse and acceptance of responsibility for the victim's death when they were made. But like other immutable facts—facts that Viton cannot change—his past statements that might indicate a lack of insight, a lack of remorse, or a lack of acceptance of responsibility when they were made can support a denial of parole "*only* if those facts

support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221.) Were that not so, the Governor could forever continue to deny parole to Viton based on the existence of these past denials of full responsibility, "permit[ting] the Governor to accomplish by indirection that which the Legislature has prohibited." (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1023 [Pen. Code and Cal. Code Regs. prohibit requiring admission of guilt as condition for release on parole]; see also *In re Lawrence*, *supra*, 44 Cal.4th at p. 1221 [issue is whether inmate *continues* to pose an unreasonable risk to public safety].)

Here (as in *In re Lawrence*), Viton's more recent demonstrations of acceptance, insight, and remorse, as well as the positive psychological assessments of Viton in more recent evaluations, undermine the evidentiary value of his earlier statements and beliefs. (See *In re Lawrence*, *supra*, 44 Cal.4th at pp. 1223-1224.) Viton's response about his current understanding, for example, reflects why he now considers his past doubts and attitudes irrelevant: "I recognize what I've done wrong. And in doing so, I wish I could turn things around, but obviously that's impossible because we can't change the past. But I personally have changed my life drastically [in dedicating himself as a Jehovah's Witness]. It was something that I should have done a long time ago . . . ."

He explained that his earlier belief that his shot would not be lethal to the victim, is no longer relevant, because "[t]he fact is I did shoot him. The fact is that he did die, that the pellets did cause his death." His earlier doubts about the victim's death is "irrelevant to me because I'm already here. I've done what I've done. I know I've done what I've done. Now I need to move on and change my life and do what I'm going to do . . . ."[3]

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[3] Viton went on to tell the Board that "I regret that this ever happened because many people have suffered for it. Myself is irrelevant, but the rest of the people that have, … [the victim's] family members, my family members, my friends even have been touched by this. So it's not something that I can take lightly. I have to accept the fact of what I've done and try to make amends [for] it. . . ."

The facts relied upon by the Governor tend to show that for some time after his conviction and incarceration—until at least 2003—Viton lacked full appreciation and resisted full acceptance of responsibility for his victim's death. But they do not support a conclusion that Viton's earlier lack of insight and remorse reflect his current mental state, or even if they do, that they indicate that Viton would pose a continuing and current risk to society if he were released. (See *In re Moses* (2010) 182 Cal.App.4th 1279, 1306-1307 [minor discrepancies in inmate's version of events do not alone demonstrate rational nexus to current dangerousness].)

Viton's more recent statements and conduct reflect increased insight into his responsibility for the victim's death and his error in permitting anger and violence to control his actions and reactions, as the Board concluded. In light of these changes in Viton's attitude and understanding—and the Governor's failure to identify or to explain any doubt about their genuineness and probity—Viton's earlier statements cannot be relied upon either to reflect his current mental state, or to show that his release would pose a current unreasonable risk to public safety.

The Governor also notes his concern about Viton's failure to understand "the role that anger played in his prior misconduct," and his "recent misconduct," citing these as indications that Viton "still poses a risk of recidivism and violence," and that his release "would pose a current unreasonable risk of danger to public safety."[4] At his Board hearing, however, Viton did address the role of anger in his commitment offense. Yet the Governor's decision makes no mention of Viton's more recent statements and understandings. He nevertheless relies on the earlier statements and conduct to predict Viton's current suitability for parole, and to find him unsuitable, without evaluating

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[4] The "recent misconduct" to which the Governor referred occurred in 2003, and was hardly "misconduct," for it involved an incident in which Viton threw a nectarine into a trash can in a manner that was interpreted by a prison officer as "unprovoked hostility." The incident resulted in a non disciplinary CDC 128A chrono—Viton's most recent negative chrono—reflecting minor misconduct. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).)

Viton's more recent insights and acceptances of responsibility, and without considering the appropriate impact they should have on his conclusion.

Viton's more recent expressions reflect both additional insight into his unjustified violent conduct represented by his commitment offense, and his full acceptance of responsibility, both for the victim's death, and for his own role in it.[5] Moreover, Viton's former statement that his conduct was justified under the circumstances at the time of his commitment offense, was not just repudiated by his more recent statements; it was not even inconsistent with his second degree murder conviction when the statement was made. As this court noted in its 1994 decision affirming Viton's conviction, under the evidence and instructions at trial the jury might have concluded that Viton was initially justified in defending his property and family, although his threats and level of violence then became unreasonable under the circumstances.[6]

The Board recognized Viton's unconditional acceptance of responsibility for his violence and remorse for its consequences; the Governor's review cites nothing indicating that Viton's expressions of acceptance of responsibility and remorse are anything but genuine, or that they fail to reflect his *current* insight and belief. And while expressly noting that since 2006 Viton has confirmed his acceptance of responsibility for

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5 Viton explained that if he were now confronted by the circumstances that led him to shoot the victim, he would leave with his family rather than engaging in a confrontation while trying to protect his property. "I'll be honest with you. I had the opportunity then [to leave] and I didn't take it because I thought that I—at that time that, you know, that was my castle per se and I had the right to do what I did. But I've learned otherwise, and now those material things don't matter to me either in that respect. . . ." It is time "to move on and change my life and do what I'm going to do, and that's to get out of here and be with my family and to serve God."

6 As the opinion notes, the jury might have believed that Viton either was or was not the initial aggressor, and that he might initially have perceived (reasonably or unreasonably) that the victim and his family were threatening harm to him, his family, and his property; but the jury might have concluded that the victim and his family then ceased any aggression and perceived themselves—reasonably—to be in mortal danger from Viton's threats of violence, justifying them in throwing bottles at Viton in reasonable self-defense, ultimately resulting in Viton's violent and unjustified reaction in shooting the victim.

the victim's death, nothing in the record indicates that the Governor considered that fact—as the regulations require—in denying parole to Viton. (Cal. Code Regs., tit. 15, § 2402, subd. (b) [inmate's suitability for parole should be evaluated using "[a]ll relevant, reliable information"]; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 655 [law provides inmates with expectation of parole unless the Board or the Governor find that they are unsuitable for parole "in light of the circumstances specified by statute and by regulation"].)

We thus conclude that the Governor's reliance on Viton's earlier statements, without considering his additional years of discipline-free incarceration, his active religious involvement with the Jehovah's Witnesses, and his committed participation in numerous guided and self-help therapeutic and rehabilitative programs since that time, reflects the Governor's failure to consider "the circumstances specified by statute and by regulation," including Viton's *current* insight, acceptance of responsibility, and remorse for his offense. And we conclude that the Governor's reversal of the Board's decision and denial of parole reflects a failure to evaluate Viton's *current* risk of dangerousness and suitability for parole. We therefore find that the Governor has failed to show support in the record for his determination that Viton continues to refuse to accept responsibility and continues to lack insight and remorse for his offense, and that even if the facts on which his decision relies had support in the record, nothing in the record shows how the current state of Viton's remorse, acceptance of responsibility, and insight into his commitment offense and its causes, are indicative of his current dangerousness or unsuitability for parole.

Disposition

The petition for writ of habeas corpus is granted. The Board's grant of parole is reinstated, subject to the Board's power to rescind that parole on an appropriate record based on events occurring after its 2009 suitability determination. (*In re Moses, supra,* 182, Cal.App.4th at p. 1315 & fn. 15; *In re Powell* (1988) 45 Cal.3d 894, 901-902

[discussing Board power to grant and rescind parole]; Pen. Code, §§ 3041.5; Cal. Code Regs., tit. 15, § 2450.)[7]

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.

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[7] Because our decision reinstates a decision of the Board—an institution of the executive branch—to grant parole, it does not infringe on executive-branch authority over that determination, as discussed in *In re Prather* (2010) 50 Cal.4th 238. (*In re McDonald, supra*, 189 Cal.App.4th at p. 1024.) By overturning the Governor's veto of the Board's decision to grant parole, "[t]the power of the executive branch is . . . not infringed, but respected." (*Ibid.*)